

ORIGINAL

006847

**BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001**

RECEIVED

JAN 21 3 58 PM '97

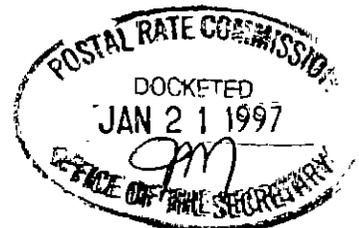
POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

SPECIAL SERVICES FEES)
AND CLASSIFICATIONS)
_____)

Docket No. MC96-3

**REPLY BRIEF OF
MAJOR MAILERS ASSOCIATION**

January 21, 1997



BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

SPECIAL SERVICES FEES)
AND CLASSIFICATIONS)
_____)

Docket No. MC96-3

REPLY BRIEF OF
MAJOR MAILERS ASSOCIATION

The Postal Service devotes a portion of its Initial Brief (pp. 34-46) to denigrating MMA witness Bentley's study. That study showed that "the dollar consequences of the Postal Service's use of a nonapproved [attribution] methodology...are huge...(Tr. 6:1893). In this Reply Brief, MMA will explain why the Postal Service's criticisms are without merit.

**A. The Commission's Action In Docket No. RM97-1
Has Outflanked USPS' Criticisms of Mr. Bentley**

To a large extent, the Postal Service's criticisms are now irrelevant.

The main thrust of Mr. Bentley's testimony is that the Postal Service should be required, before the next omnibus rate case, to disclose the impact of the Commission-approved methodology upon postal costs (Tr. 6:1898, 1999). For this purpose, Mr. Bentley urged the Commission to follow through on its promise (in Order No. 1134) to adopt a regulation requiring this disclosure (Tr. 6:1898-99).

Mr. Bentley testified before the Commission instituted the rulemaking proceeding in Docket No. RM97-1 (Order No. 1146). The Bentley study was designed to show a need for a regulation of the type proposed in Docket No. RM97-1. Now that the Commission has made its own independent finding of need, the precise details of the Bentley

study are no longer so important.

B. The Postal Service's Opportunities To Contest Mr. Bentley's Testimony Negate Any Claim That Due Process Was Denied

The Postal Service's objections to Mr. Bentley's study are garnished with repeated Due Process claims (USPS I. Br., pp. 34, n. 27; 36; 37, n.30; 46).

But the Postal Service has had more than enough opportunity to challenge Mr. Bentley's study. While Mr. Bentley was on the witness stand, the Service cross-examined and recross-examined Mr. Bentley at length. (See Tr. 6:1984-2008, 2034-36, 2044-46.) And the Service submitted written cross-examination in the form of Mr. Bentley's answers to 34 interrogatories (Tr. 6:1905), supplemented later with Mr. Bentley's answers to an additional 19 interrogatories (Tr. 11:3683-3701).

Moreover, the Commission was willing to have Mr. Bentley recalled for additional cross-examination. The Postal Service, however, decided to forgo any recall.¹

The Service pretends that it lacks the resources to analyze the substance of Mr. Bentley's study. In fact, the Bentley study-in-chief is no more than an update of a similar study that the same witness presented in Docket No. R94-1 two and one-half years ago (R94-1 Tr. 13A:6082-85). The study is a comparison of the effects on postal costs of the Commission-approved and Service-preferred methodologies for attributing city-carrier delivery costs. This has been a subject of dispute in the past several Commission proceedings. The Postal Service is competent to make and analyze this comparison, for "[i]t

¹ See Comments of USPS Concerning Further Procedure Related to MMA Witness Bentley's New Analysis, p. 1 (Dec. 17, 1966).

has a large technical staff with the specialized background required" to attribute postal costs under both the Commission-approved and Service-preferred attribution methodologies. (See Order 1146, pp. 4-5.)

In view of this, the Service's Due Process claims are undercut by its decision not to rebut Mr. Bentley's testimony. If the Postal Service believed that the Bentley study was factually erroneous, the Service would have presented a witness to say so. Yet, in disclaiming any intention to present rebuttal,² the Service did not mention Mr. Bentley's study-in-chief, filed in September, months before rebuttal was due. Instead, the Service discussed only its decision not to rebut Mr. Bentley's supplemental calculations, which confirmed the study-in-chief. (Even here, the Service's supposed justification for not filing rebuttal is overblown, as explained in Section E of this Reply Brief.) Having waived rebuttal, the Service cannot sustain its assertion that Commission reliance upon the Bentley study violates Due Process.

C. The Commission Has Already Rejected the Service's Objections To the Use of Library Reference, PRC-LR-1 and 2

The Service also argues that Mr. Bentley's study cannot be given any weight because of its reliance upon the Commission's Library Reference, PRC-LR-1 and 2.

The Postal Service's contentions are a repeat of those contained in its November 14 motion to strike Mr. Bentley's testimony, denied by Order No. 1143. Thus the Service repeats (I.Br. pp. 33-37) its argument that, since PRC-LR-1 and 2 are not in evidence, Mr. Bentley's

² See *supra*, note 1. See also Comments of USPS Concerning Rebuttal Testimony to MMA Witness Bentley's New Analysis (Nov. 25, 1996).

statements about that document may not be considered as evidence. But the Commission ruled that the Service's argument "misapprehends the nature of evidence in administrative proceedings before expert regulatory bodies" (Order No. 1143, p. 5). In particular, as the Commission recognized (*id.* at 5-6), the Administrative Procedure Act, the Commission's rules, and the Federal Rules of Evidence allow expert witnesses to rely upon material that is not part of the evidentiary record and, thus, technically hearsay.³

The Postal Service seeks to evade this rule by arguing (I.Br., p. 36, n. 29) that Mr. Bentley is not an "expert" on PRC-LR-1 and 2 since he supposedly "knew nothing about it" (*id.*) and was "unable to replicate, verify, validate or otherwise explain...it" (p. 34). It is not necessary to correct the Service's misstatement of Mr. Bentley's familiarity with PRC-LR-1 and 2. The rule is that, as illustrated by the court decisions under the Federal Rules of Evidence, expert witnesses are not expected to be able to replicate, verify or validate the nonrecord studies upon which they rely.

D. There Is No Record Support For the Service's Contentions About Shortcomings In the Study

In its Initial Brief, the Postal Service substitutes lawyers' rhetoric for expert analysis. Thus the Service alleges that Mr. Bentley used inconsistent data from Commission cost models (pp. 37-40); his answers to some interrogatories are labeled as "confused" (pp. 40-41), "muddled" (p. 42), "untrue" (p. 43) and "utter nonsense" (p. 44); and his data is said (pp. 44-45) to be "suspect," "simplistic," "unproven," and "entitled to no weight." But all these criticisms are authored by the Service's lawyers. No USPS witness

³ See also MMA's Opposition to USPS' Motion to Strike Testimony of MMA Witness Bentley, pp. 2-4 (Nov. 18, 1966).

came forward to challenge Mr. Bentley's testimony.

As noted earlier, if the Service truly doubted the accuracy of Mr. Bentley's study, it could and would have produced a rebuttal witness to supply the correct calculations. (See Part B of this Reply Brief.) By its decision not to present any evidence rebutting Mr. Bentley, the Postal Service demonstrated that it had no reason to doubt the soundness of Mr. Bentley's study.

E. The Service Could Have Completed Its Analysis of Mr. Bentley's Supplemental Study In Ample Time To Challenge It With Rebuttal Evidence

The Service is also mistaken about the timeliness of Mr. Bentley's so-called "new analysis" (I.Br., p. 46).

Initially, the Service's description of these Bentley calculations is a misnomer. Responding to OCA's question during cross-examination, Mr. Bentley acknowledged that he had an independent confirmation of the conclusions in his case-in-chief--and that this confirmation was based upon data from the Docket No. R94-1 record (in lieu of the Library Reference, PRC-LR-1 and 2, used in his case-in-chief) (Tr. 6:2009-10). Subsequently, after the Postal Service protested that these were "new numbers," and that it was "entitled to see these" (Tr. 6:2010), MMA supplied Mr. Bentley's calculations for the record (Tr. 6:2011, 2013, 2036-42).

The Postal Service tried to have these R94-1 calculations stricken from the record. The Presiding Officer, however, denied the Postal Service's motion (Ruling No. MC96-3/28). The Presiding Officer also authorized the Postal Service to submit additional interrogatories to Mr. Bentley and, if it wished, to have additional time within which to prepare rebuttal (*id.* at 6-7).

Despite these concessions, the Postal Service argues (I.Br., p. 46) that it was unable to prepare rebuttal expeditiously. One reason

for this, the Postal Service says (*id.*) is that "Witness Bentley's new analysis was neither simple nor straightforward...." Rejecting this contention, however, the Presiding Officer found that Mr. Bentley's R94-1 calculations "do not present new, particularly innovative, or particularly complex analyses" (Ruling No. MC96-3/28, p. 4).

The Postal Service also contends (I.Br., p.46) that it was hindered by the fact that Mr. Bentley's R94-1 calculations "generat[ed] three rounds of discovery." But the Postal Service's extended discovery efforts were totally unnecessary. When Mr. Bentley testified, two months ago, MMA offered to have Mr. Bentley explain his R94-1 calculations, but the Postal Service declined that offer (Tr. 6:2042-43). A few days later, on November 22, MMA wrote to the Postal Service, renewing the offer to provide all Mr. Bentley's calculations and workpapers and to have Mr. Bentley available for formal or informal data conferences, either in person or by telephone.⁴ By choosing to decline these offers for expedited discovery, and preferring more cumbersome procedures, the Postal Service manufactured its own delays.

F. The Service's Criticisms of the Bentley Study Ignore the Fact That the Study Was Necessitated By the Service's Defiance of Numerous Commission Orders

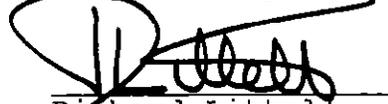
The Commission can rely upon Mr. Bentley's study even if it contains imperfections. Undoubtedly, the Postal Service itself could have produced a more detailed comparison of the cost consequences of using the Commission-approved methodology. Indeed, the Commission ordered the Postal Service to produce such a study (Orders Nos. 1120 and 1126), but "[t]he Postal Service refused" (Order 1146, p. 5).

⁴ See Letter dated November 22, 1996, which is Attachment A to MMA's Response to USPS' "Supplemental Comments" To Strike MMA Witness Bentley's "New Analysis" (dated Nov. 25, 1996 but stamped as filed on November 22). See also Ruling No. MC96-3/28, p.5.

Because of this "impasse between the Commission and the Service," Mr. Bentley was "compelled to seek a second-best basis for [his] calculation" (Tr. 6:1895). The Postal Service is not justified in complaining about the employment of a "second-best" approach that the Service's own conduct necessitated.⁵

IN VIEW OF THE FOREGOING, MMA asks the Commission to reject the Service's attempts to denigrate MMA witness Bentley's study.

Respectfully submitted,



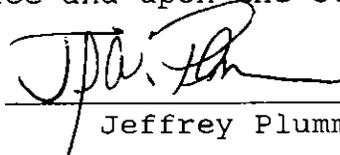
Richard Littell
 1220 Nineteenth St. N.W., Suite 400
 Washington, DC 20036
 Phone: (202) 466-8260

January 21, 1997

Counsel for MMA

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the U.S. Postal Service and upon the other parties by First-Class Mail.



January 21, 1997

Jeffrey Plummer

⁵ The Service's failure to produce the requested information, which would prove or disprove the accuracy of Mr. Bentley's study, justifies a presumption that Mr. Bentley's study is accurate. "It is generally held that, where [one] party...possesses positive and complete knowledge concerning the existence of facts...or has peculiar knowledge or control of evidence of such matters, the burden rests on him to produce the evidence, the negative averment being taken as true unless disproved by the party having such knowledge or control." 31A C.J.S., Evidence §113 (1964) (citations omitted). "In the absence of explanation, the failure or refusal of a party to produce evidence may create an adverse inference where such evidence is within his knowledge, and where, the courts have declared, the evidence which the party fails or refuses to produce is within his power to produce, is not equally accessible to his opponent, and is such that he would naturally produce it if it were favorable to him." *Id.* at §156(1) (citations omitted). Accord, 2 Wigmore on Evidence §§285-91 (Chadbourne Rev. 1979); Jones on Evidence §3:91 (1972).